

No. 12,771

IN THE

United States Court of Appeals  
For the Ninth Circuit

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THELMA D. HAYES,

*Appellant,*

vs.

FIRST NATIONAL BANK OF FAIRBANKS,

Executor of the Estate of Louis D.

Colbert, deceased,

*Appellee.*

Appeal from the United States District Court for the  
Territory of Alaska, Fourth Division.

PETITION FOR REHEARING.

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*To the Honorable William Denman, Chief Judge, and  
to the Honorable Associate Judges of the United  
States Court of Appeals for the Ninth Circuit:*

Comes now the above named appellant, THELMA D.  
HAYES, and files this, her Petition for Rehearing, and  
for grounds states:

**I.**

That this Honorable Court, in affirming the Opin-  
ion of the District Court for the Territory of Alaska,  
Fourth Division, has set up a dangerous precedent in

the law of evidence regarding contest of wills, in that it permits competent, uncontradicted testimony to be disregarded in favor of weaker evidence and shifts the burden of proof from the contestant to the proponent. To allow this judgment to stand will work great hardship and damage, and in effect take away from aged and infirm individuals the right given them by 3 A.C.L.A. 59-1-2 to dispose of their property.

## II.

From the Opinion of the United States Court of Appeals for the Ninth Circuit, filed October 29, 1951, it is apparent that the Court decided this case believing that it could not consider the testimony of witnesses supporting the competency of the testator, Louis D. Colbert. It is the opinion of the undersigned that it was the duty of the Court to examine all testimony submitted with the record, and having done so, it could only conclude that the decision of the District Court was clearly and manifestly against the weight of the evidence. The Circuit Court of Appeals for the Sixth Circuit has stated as follows:

*Horvath v. McCord Radiator & Mfg. Co.*, 100 F. (2d) 326, 332, 333 (1938).

"The findings of a Master or the district court are presumptively correct and cannot be assailed unless an examination of the record shows that the Master or the lower court made no specific findings of fact in reference to the precise issues or the physical facts demonstrate the unsoundness of the facts found or if the Master or court man-

ifestly misapprehended the evidence or went against its clear weight, or applied an erroneous rule of law which was necessary to the making of the fact findings. *Uihlein v. General Electric Co.*, 7 Cir., 47 F. 2d 997, 1001.

“In considering equity cases on appeal, the court must give much weight to the finding of the Master or district court on disputed issues. However, we are not required to accept such findings in the same sense that we accept the verdict of a jury in an action at law respecting an issue over which there is a dispute, and if on the *whole record* the evidence decidedly preponderates against the findings of the Master, the reviewing court is not bound by them. *Vandenburgh v. Truscon Steel Co.*, 6 Cir., 277 F. 345 \* \* \*” (Emphasis supplied).

From a consideration of the entire record of the case, it is apparent that the overwhelming weight of the evidence is in favor of the proponent of the will. Three competent witnesses testified as to the condition of the testator's mind at the actual moment that the will was executed, and other witnesses who had seen him on the day in question gave proof to the fact that he was able to understand fully the nature of his act. This testimony stands uncontradicted inasmuch as the appellee failed to produce any witness who had seen or talked to the testator upon the day the will was executed and who might have controverted the appellant's witnesses. There were nurses and Sisters on duty at the hospital at all times, as well as other patients who could have been called to testify on this subject, but

the appellee did not see fit to call any of these persons. There is nothing in the record which discloses that the appellee made any attempt to discredit the testimony of the appellant's witnesses and therefore their statements must be accepted as true and the decision based thereon.

I quote from *State ex rel. Nagle, Atty. Gen. v. Naughton et al.*, 63 P.2d 123, 124:

"This is a suit in equity, and the rule is well established that the judgment of the trial court will not be disturbed unless the evidence preponderates against it. In a situation such as here presented, it becomes the duty of this court to review the evidence presented by the record; and if this court determines that the findings of the trial court are not sustained by a preponderance of the evidence, to set such findings and judgment aside and 'makes its own conclusions'.

"But what is to be said of a case of this character where the uncontradicted evidence establishes the plaintiff's cause of action, and where the record is barren of any suggestion that plaintiff or any of his witnesses is unworthy of belief, but, notwithstanding these facts, the trial court finds against the plaintiff? Where, as in this instance, a cause is tried to the court, its decision or finding has the same effect as the verdict of a jury, and, when contrary to or not sustained by the evidence, will be set aside. 20 R.C.L. p. 280 Sec. 62. *The rule that the trial court may not disregard uncontroverted credible evidence is fundamental.* Haddox v. Northern Pac. Ry. Co., 43 Mont. 8, 113 P. 1119." (Emphasis supplied).

It is the opinion of the undersigned that there is absolutely no evidence to support the finding that the testator was not of sound mind on the day and at the time that the will was executed because no witnesses were produced to testify on this subject. It is true that mental condition prior and after execution of a will have some bearing as to the condition of the mind of the testator at the time the will was executed, but in the face of positive testimony that he was capable of understanding what he was doing, such testimony must be disregarded. The rule is succinctly stated in Vol. 1, Bancroft's Probate Practice, 2nd Ed., Sec. 212, page 523:

“Where the contestant has the burden of proof upon such an issue, it devolves upon him to prove incompetency of the testator *at the very moment of the execution of the will*; that the will upon its face was not a rational act; that it was not made during a lucid interval; and that the delusion of the testator controlled his volition and its execution. In re Schwartz's Estate (1945) 67 Cal App 2d 512, 155 P2d 76.” (Emphasis supplied).

### III.

That the Court erred in stating that “The question before us is whether Hayes has sustained her burden of proof that Colbert on October 22, 1946, had the required sound and disposing mind to execute the will of that date.”

I quote from Vol. 1, Bancroft's Probate Practice, Sec. 206, pages 499, 500:

“In California, Utah, and Wyoming, it is directly held that upon opposition to probate the contestant has the burden of prevailing by a preponderance of all the evidence upon the question of want of testamentary capacity.<sup>7</sup> The California court has held that mere proof of mental derangement or even of insanity in a medical sense is not sufficient to invalidate a will, but the contestant is required to go further and prove either such a complete mental degeneration as denotes utter incapacity to know and understand those things which the law prescribes as essential to the making of a will, or the existence of a specific insane delusion which affected the making of the will in question.<sup>8</sup>”

And in the same volume, Sec. 207, pages 503 and 504, as to presumptions:

“Such burden never shifts, but remains the same throughout any litigated controversy. On the other hand, when a presumption is raised which *prima facie* establishes an issue one way or the other for the time being, in default of some evidence to combat such presumption the holding must be in accordance therewith. Sanity and mental competency, for example, are presumed to have existed until the contrary is established by competent proofs.<sup>20</sup> Furthermore, testamentary capacity is always presumed, and the *burden rests on a contestant to show affirmatively and by a preponderance of the evidence* that the testator, *at the time of executing the will*, was of unsound mind and that unsoundness actually affected or controlled testamentary capacity.<sup>1</sup>” (Emphasis supplied).

The appellee has failed utterly to introduce any evidence, much less prove by the *preponderance* of the evidence that on the day in question and at the specific time the will was executed that the testator was of unsound mind. And the record is completely void of any evidence which would tend to show that the hallucinations suffered by the testator or his forgetfulness actually affected or controlled the making of his will. To quote again from Bancroft's Probate Practice, Sec. 212, pages 523, 524:

“In order that a will may be set aside for insanity or mental derangement, the abnormalities of mind must have had a direct bearing on the testamentary act, and the evidence must establish the fact that the testator devised or bequeathed his property in a manner which, except for the mental infirmities, he would not have done.<sup>19</sup> Thus, old age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends or relatives, physical disability, absent mindedness and mental confusion do not furnish grounds for holding that a testator lacked testamentary capacity.<sup>19-5</sup> (Ridgway's Estate (1949) 92 Cal App2d 325, 206 P2d 892; Doty's Estate (1949) 89 Cal App2d 747, 201 P2d 823; Alegria's Estate (1949) 87 Cal App2d 645, 197 P2d 571).”

The will of Louis D. Colbert cannot be considered an unnatural will, since it makes provision for the nearest relative of the testator and the person who befriended him most in this life. There is no showing that but for his mental attitude he would have dis-

posed of his property in some other manner. In fact the evidence is overwhelming to the fact that he had a keen awareness of the nature of his act and objects of his bounty, which stands uncontradicted, and which cannot be contradicted, since the two documents executed within a day of each other as last wills and testaments of the said Louis D. Colbert stand as valid proof of the comprehension of which he was capable, in that he ordered specific changes in the document first executed, and expressed complete satisfaction with the second. Even Dr. Schaible, in answer to a hypothetical question, testified that "I meant a person who he said a person who desired to make a will on the 15th and called an attorney to make the will according to his instructions and then later signed it and later called him back presumably—someone who did all that I would say he is of presumably of sound and disposing mind, if he did it according to his directions." (TR 203). And at TR 205, in answer to the question: "Doctor Schaible, when a man with this senile type of structure to which you referred Mr. Colbert had at this time, have periods when he would be clear and of disposing memory?", he replied: "I think so . . . It is possible." And the District Court as well as the Probate Court believed the doctor. Such evidence cannot be disregarded. To do so imposes an undue burden upon a proponent of a will in the Territory of Alaska which is not present in any other jurisdiction. It is the opinion of the undersigned that this decision should not stand and become the precedent for all subsequent contest of wills.

WHEREFORE, the appellant prays that this Honorable Court grant her petition for a rehearing of this matter.

Dated, Anchorage, Alaska,  
November 26, 1951.

Respectfully submitted,

J. L. MCCARREY, JR.,

WARREN A. TAYLOR,

*Attorneys for Appellant  
and Petitioner.*



CERTIFICATE OF COUNSEL.

J. L. McCARREY, JR., of counsel for the appellant and petitioner, in the foregoing matter, does hereby certify that in his opinion this Petition for Rehearing is well founded and based upon valid reasons, and that the same is not interposed to create delay in the disposition of this case.

Dated, Anchorage, Alaska,  
November 26, 1951.

J. L. McCARREY, JR.,  
*Of Counsel for Appellant  
and Petitioner.*